U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF E-, INC.

DATE: FEB. 9, 2016

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, an IT services company, seeks to permanently employ the beneficiary in the United States as a computer systems analyst under the immigrant classification of advanced degree professional. *See* Immigration and Nationality Act (the Act) § 203(b)(2), 8 U.S.C. § 1153(b)(2). The Director, Nebraska Service Center, denied the petition. The petitioner filed a motion to reopen and a motion to reconsider, together with an appeal. After considering the motion(s) the Director issued another decision affirming the denial of the petition. The matter is now before us on appeal. The appeal will be dismissed.

The Petitioner submitted the instant petition, Form I-140, on October 15, 2013. As required by statute, the petition was accompanied by an ETA Form 9089, Application for Permanent Employment Certification, which was filed with the U.S. Department of Labor (DOL) on January 29, 2013, and certified by the DOL (labor certification) on July 12, 2013.

On January 13, 2014, the Director denied the petition. In his decision the Director found that the Beneficiary did not have all of the experience specified on the labor certification to qualify for the job offered and that the Petitioner did not establish its continuing ability to pay the proffered wage from the priority date (January 29, 2013) up to the present. The Director also noted that the documentation of record did not corroborate the number of employees asserted by the Petitioner on the ETA Form 9089 and the Form I-140, and that the records of U.S. Citizenship and Immigration Services (USCIS) showed that the Petitioner had filed at least three other immigrant petitions since August 1, 2011, as well as over 30 nonimmigrant petitions.

On February 11, 2014, the Petitioner filed two Form I-290Bs – one identified as a motion to reopen and a motion to reconsider[1] and the other identified as an appeal – together with supporting documentation.

The motions have been adjudicated by the Director. In a decision issued on June 25, 2015, the Director reviewed the evidence of record and once again found that the Beneficiary did not meet all the requirements of the labor certification – specifically, experience in the C# programming

[1] The motion(s) to reopen and reconsider bear Receipt Number

language – to qualify for the job offered. The Director also found, based on the evidence of record, that the Petitioner did not establish its ability to pay the proffered wage from the priority date onward. In addition to the instant Beneficiary, the Director noted that the Petitioner must demonstrate its ability to pay the proffered wages of the other beneficiaries of immigrant petitions it filed, which the documentation of record did not do. For the reasons described above, the Director affirmed his original denial of the petition.

The Petitioner's appeal is now before us. We conduct appellate review on a *de novo* basis. *See Soltane v. Department of Justice*, 381 F.3d 143, 145 (3d Cir. 2004).

I. THE PETITIONER'S ABILITY TO PAY THE PROFFERED WAGE

The regulation at 8 C.F.R. § 204.5(g)(2) provides, in pertinent part, as follows:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements . . . .

Thus, the Petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the labor certification application was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). In this case, the priority date is January 29, 2013. The proffered wage as stated on the ETA Form 9089 (Part G) is $79,955 per year.

A petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the certified ETA Form 9089, a petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. A petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires a petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will also be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining a petitioner's ability to pay the proffered wage from the priority date onward, USCIS will first examine whether a petitioner employed and paid the beneficiary during that period. If a petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to

or greater than the proffered wage, the evidence will be considered *prima facie* proof of a petitioner's ability to pay the proffered wage.

In the instant case, the Petitioner indicates that it has employed the Beneficiary since January 2013. The record includes copies of the Forms W-2, Wage and Tax Statements, issued to the Beneficiary for 2013 and 2014,[2] which show that he received compensation totaling $21,875.00 in 2013 and $62,777.60 in 2014. In both years, therefore, the compensation paid to the beneficiary was less than the proffered wage of $79,955.00.

Accordingly, the Petitioner must demonstrate that it could have paid the difference between the compensation actually paid to the Beneficiary and the proffered wage in 2013 and 2014. Those dollar amounts are $58,080.00 in 2013 and $17,177.40 in 2014.

If a petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the pertinent period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *See Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on a petitioner's gross receipts and wage expense is misplaced. Showing that a petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that a petitioner paid wages to all of its employees in excess of the proffered wage to the beneficiary is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because they ignore other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the

[2] These documents were submitted to USCIS in support of another Form I-140 filed by the Petitioner on behalf of the Beneficiary on October 28, 2015 (Receipt Number [redacted].

> depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
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> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The record includes copies of the Petitioner's Form 1120, U.S. Corporation Income Tax Return, for the years 2013 and 2014.[3] A corporation's net income is recorded on page one line 30 of the Form 1120 (as "Taxable income"). The Petitioner's net income was $40,795 in 2013 and $30,463 in 2014.

While the Petitioner had sufficient net income to pay the shortfall between the compensation actually paid to the beneficiary and the proffered wage in 2014 ($17,177.40), the Petitioner did not have sufficient net income to pay the shortfall between the compensation actually paid to the Beneficiary and the proffered wage in 2013 ($58,080). Therefore, the Petitioner has not established its continuing ability to pay the proffered wage to the instant Beneficiary from the priority date onward based on its net income year by year.

As an alternate means of determining a petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between a petitioner's current assets and current liabilities.[4] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 (of Form 1120). Its year-end current liabilities are shown on Schedule L, lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

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[3] These documents were also submitted to USCIS in support of the other Form I-140 filed by the Petitioner on behalf of the Beneficiary on October 28, 2015 (Receipt Number [redacted]).

[4] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

The Petitioner's net current assets were recorded as $40,795 in 2013 and $0 in 2014. Thus, the petitioner did not have sufficient net current assets to pay the shortfall between the compensation actually paid to the Beneficiary and the proffered wage in either 2013 or 2014.

Accordingly, from the date the ETA Form 9089 was accepted for processing by the DOL (the priority date) up to the present the Petitioner has not established its continuing ability to pay the proffered wage by means of the compensation it actually paid to the Beneficiary, or its net income, or its net current assets.

On appeal, the Petitioner asserts that it has paid the Beneficiary the prevailing wage, and submitted the DOL-approved prevailing wage determination (on ETA Form 9141)[5] and selected pay statements as evidence thereof. However, the prevailing wage in the I-129 (nonimmigrant) proceeding -- $79,955 – is the same as the proffered wage in this I-140 (immigrant) proceeding. Neither the pay statements nor the previously discussed wage and tax statements (Forms W-2) issued to the Beneficiary for the years 2013 and 2014 demonstrate that the Petitioner paid the proffered wage to the Beneficiary during those years.

USCIS may also consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967).[6] On appeal the Petitioner states that it was incorporated in July 2011, has been expanding since then (which accounts for the fluctuation in its employee totals), and has greatly increased its gross income and tax liabilities since 2011. The income tax returns in the record, including the Petitioner's Forms 1120 for the years 2011-2014, show that its gross receipts totaled $142,951 in 2011, $1,169,982 in 2012, $1,606,056 in 2013, and $1,688,111 in 2014. Other tax documentation in the record shows that the Petitioner's employee total rose from three in 2013 up to 13 by the third quarter of 2015. While the income and employee figures do indicate that the Petitioner's business has grown since its commencement in 2011, it is insufficient to establish a

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[5] The prevailing wage determination was issued by the DOL in conjunction with a Form I-129 nonimmigrant petition that was filed by the Petitioner on behalf of the Beneficiary.

[6] The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

long-term historical growth and it does not overcome the lack of evidence to show that the Petitioner had sufficient financial resources to pay the Beneficiary's proffered wage in 2013 and 2014 – *i.e.* from the priority date (January 29, 2013) onward. Considering the evidence of record, we determine that the Petitioner has not established its continuing ability to pay the proffered wage based on the magnitude of its business or the totality of its circumstances, as in *Sonegawa*.

In addition to the instant Beneficiary, the Petitioner must establish its ability to pay the proffered wages of all its other beneficiaries of immigrant (Form I-140) petitions from the priority date of the instant petition until each beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2); *see also Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977). USCIS records show that other immigrant petitions have been filed by the Petitioner, as the Director mentioned in his decision affirming the denial of the instant petition. On appeal the Petitioner has not submitted any information or documentation about these additional petitions, or even acknowledged the issue. Thus, the record does not establish that the Petitioner has the ability to pay its other beneficiaries.

For all of the reasons discussed above, we conclude that the Petitioner has not established its continuing ability to pay the proffered wage of the instant Beneficiary, or the proffered wages of the beneficiaries of its other immigrant petitions, from the priority date of the instant petition up to the present. Accordingly, the petition cannot be approved.

II. THE BENEFICIARY'S QUALIFICATIONS FOR THE JOB OFFERED

The Petitioner must also establish that the Beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the Beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification (Part H of the ETA Form 9089) to determine the required qualifications for the position.

Among the requirements for the job offered in this case are the "[s]pecific skills or other requirements" listed in Part H.14 – specifically: "C/C#, Java, PL/SQL, Oracle etc." As pointed out by the Director in his decision affirming the denial of the petition, the record did not show that the Beneficiary had any experience with C# computer programming.

On appeal the Petitioner claims that the Beneficiary has all of the experience required for the job. No new evidence has been submitted, however, to show that the Beneficiary had any experience with C# computer programming. The only new item submitted in support of the appeal is an updated letter from a previous employer – [redacted] Minnesota – dated February 3, 2014, certifying that the Beneficiary had been employed as a computer programmer from January 2007 to January 2013. The letter listed the technologies the Beneficiary worked on with the company, which included C and C++ programming technologies, but not C#.

We conclude, therefore, that the Petitioner has not established that the Beneficiary met all of the specific skill requirements set forth on the labor certification as of the priority date. For this reason as well, the petition cannot be approved.

III. CONCLUSION

The petition cannot be approved on the following grounds:

1. The Petitioner has not established its continuing ability to pay the proffered wage from the priority date up to the present.

2. The Petitioner has not established that the Beneficiary met all of the experience requirements set forth on the labor certification as of the priority date.

For the above stated reasons, considered both in sum and as independent grounds for denial, the petition may not be approved. Accordingly, the appeal will be dismissed.

The burden of proof in these proceedings rests solely with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361 (2012); *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). That burden has not been met in this action.

ORDER: The appeal is dismissed.

Cite as *Matter of E-, Inc.*, ID# 15048 (AAO Feb. 9, 2016)